IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4649 OF 2004

Vinay Kumar Kedia ...Applicant

V/s.

Central Bureau of Investigation
and another ...Respondents

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Mr. A.P. Mundargi, Advocate the applicant.

Mr. V.C. Gupte, counsel for Respondent No.1.

Mr. Y.S. Shinde, A.P.P. for the State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 31.08.2005

DATE OF PRONOUNCING THE ORDER : 05.10.2005

P.C.:-

1. Heard the learned senior counsel for the applicant i.e. original accused No.4 and the learned counsel for Respondent No.1 i.e. C.B.I.

2. The applicant has prayed for quashing of proceedings relating to Special Case No.29/2003 which is pending before the learned Special Judge, Greater, Mumbai. The said case is under Sections 409, 420 r.w. 120-B of I.P.C. and under Prevention of Corruption Act. It may be stated here that some of

the other accused are being prosecuted under the Prevention of Corruption Act and not the applicant.

3. The applicant had earlier preferred an application for discharge before the learned Special Judge. By order dated 16.9.2004 the learned Special Judge rejected the said application. Hence, the present application has been preferred. The applicant is seeking discharge on the ground that there is no overt act on his part and he has been roped in only on the strength of his allegedly being a Director of both the companies.

4. Few facts relating to the present case are as under:-

4-a). The applicant is the Vice President of Kedia Group. This group consists of various companies. Two of the companies belonging to the group of are Kedia Distilleries (hereinafter referred to as KD) and Kedia Castle Dellon Industries Ltd. (hereinafter referred to as the KCDIL. It is an admitted fact that the applicant was the director of both these companies, though it is the case of the applicant that at the relevant time he was not a director of these companies.

4-b). In the present case, accused No.1 Shri. Dave was the Managing Director of Bank of India Mutual

Fund (BOIMF) and accused No. 2 Mr. Kathuria

was the Chairman of BOIMF. Both accused No. 1 and 2 were officers of BOIMF during the relevant period. Accused No.1 was the Managing Director of Bank of India Assets Management Company (BOIAMC) and accused No.2 was Chairman of said BOIAMC. BOIAMC was overseeing management of BOIMF and looking after investments of BOIMF. The offence is alleged to have taken place in two parts. The first part is that accused Nos.1 and 2 entered into a criminal conspiracy with accused Nos. 3,4 (applicant) and 5 who were office bearers of KD and KCDIL. BOIAMC was offered 5,10,000/- shares of KD at Rs.130/- per share. The understanding was that the said shares would be bought back by the company on a specified date at Rs.156/- per share i.e. the value of the shares plus interest thereon for the said period. However, thereafter, the company turned back of its promise to buy back the shares and ultimately only 15,000/- shares were purchased back at the rate of Rs.157/-. In view of this, BOIAMC was cheated to the tune of Rs.6.32 Crores.

4-c). The second part of the offence is that 10,00,000/- non convertible debentures (N.C.Ds.) of Rs.100/- each of KCDIL were placed with BOIMF. At the time of placement, it was stated that the company would come out with a public issue. On the basis of

this statement loan of Rupees Ten Crores was obtained from BOIMF by KCDIL. The said loan was to be returned back after the public issue was subscribed, however, thereafter there was no public issue.

5. Witness P.W.12 Sanjay Athlay, Research Manager, BOIAMC has stated that he has seen offer sheets pertaining to purchase of 1,10,000/- shares of KCDIL on 26.5.1995. These offer sheets were prepared on the instructions of accused No.1 Sharad Dave. This witness has further stated that he distinctly remembered that the promoters of KD were present in the chamber of Mr. Dave at that time. Mr. Dave told this witness they should purchase shares of KCDIL. Shri. Sanjay Sattarkar, Assistant Manager, BOIAMC, has stated that BOIAMC was supposed to enquire about the profitability of the company, future prospect of the company, past track record of the company and volume of shares being traded in the Stock Exchange. This was the normal procedure when shares were offered to BOIMF, however, this normal procedure was not followed by BOIAMC in the case of Kedia.

6. Mr. Naveen Dalal, Stock Broker has stated that contract note in relation to one lakh shares of K. D. to BOIMF at the rate of Rs.130/- per share was issued by him on offer basis. Witness Mr. Suresh Jain who is Stock Broker has stated that on

29.3.1996, the rate of share of KD was between Rs. 48/- to Rs.50/- per shares, whereas the price of the share was quoted as Rs.157/- per share. This was in respect of the contract note in relation to buy back of KD shares. In this regard, accused No.1 Mr. Dave told this witness that there was buy back deal and company had agreed to buy back those shares at the said rate. Shri. Ashit Raja, Manager Surveillance, Mumbai Stock Exchange, has stated that enquiries were made into jacking up of the prices of the shares of KD. He has stated that the price which was Rs.105/- per share as on 1.9.1994 had gone upto Rs.430/- in January, 1995. The transaction in the present case took place between May, 95 to November, 95. Hence, it is seen that the price when the shares was placed with BOIAMC, were rigged thereby they were over inflated and thereafter the shares were placed with BOIAMC at the price of Rs.130/- per share.

7. From the evidence of Shri. Ramamurthy and Shri. A. Ramanritan, it is clear that the applicant was the Vice Chairman of Kedia group and both KD and KDCIL were owned by Kedia group.

8. On behalf of the applicant it is submitted that he had resigned as director of both companies at the relevant time. It is stated that he resigned from directorship on 30.4.1995. In support of this contention reliance is placed on copy of form No.32.

In this connection, it would be pertinent to note the observations of the Supreme Court in the case of **Raj Lakshmi Mills Vs. Shakti Bhakoo reported in (2002) 8 SCC 236**. In the said case the High Court had quashed the proceedings on the assumption that "X" was not in charge of or responsible for the conduct of business of the firm. The Supreme Court has observed that "We are of the opinion that at the stage of summoning when evidence was yet to be led by the parties, the High Court could not on an assumption of facts come to a finding of fact that the accused was not responsible for the conduct of the business. On this ground alone, these appeals are allowed and the impugned decision of the High Court is set aside".

9. Moreover, in the case of **State of M.P. Vs. Awadh Kishore Gupta & Ors. reported in (2004) 1 SCC 691,** the Supreme Court has observed that in the matters under Section 482 of Cr.P.C., annexures to the petition cannot be termed as evidence without being tested and proved and hence, these annexures should not be acted upon by the High Court. So also, in the case of **Chand Dhawan Vs. Jawaharlal and Ors. reported in (1992) 3 SCC 317,** it has been held by the Supreme Court that the Court should not act on annexures to the petition where the documents are not admitted or accepted by the complainant. In view of the facts of this case and the observations of the Supreme Court in the various decisions cited above, I

am of the opinion that no reliance can be placed on the submission that applicant had resigned much prior to the date when the cause of action arose.

10. It would also be pertinent to note that it is the prosecution case that the offence in question has taken place during the period from May 95 to November 95. Mr. Gupte, the learned advocate for C. B. I. has submitted that in fact the said transaction took place on or about 31.7.1995. Mr. Gupte, has further submitted at the relevant time, the applicant was very much on the Board of Directors of both the companies. He has submitted that as per the copy of resolution passed by the Board of Directors of KCDIL in the Board meeting held on 20.10.1995, it was resolved that the present applicant alongwith other directors and Managing Director, co-accused No.3 who is the father of the present applicant, was singly empowered to accept terms and conditions of issue of N.C.D. and was authorised to execute the necessary documents for giving effect to the issue of N.C. Ds. The said resolution is part of the charge sheet. The contents of the said resolution show that the present applicant at that time i.e. on 20.10.95 was still holding the post as director of both the companies. Thus, I do not find much substance in the submission that the applicant was not a director at the relevant time. According to Mr. Gupte, as the applicant was director of both the companies during the period that

offence took place, being a director of the company, he would be responsible and answerable for the acts of the company.

11. Mr. Mundargi, has submitted that there is nothing on record to show that there was any overt act on the part of the applicant in respect of both allegations against the applicant. In answer to this, Mr. Gupte has submitted that the main charge against the applicant is that of conspiracy. In a case of conspiracy, there is hardly ever direct evidence available concerning hatching of conspiracy. Whether there is any conspiracy has to be inferred from the facts and circumstances of a particular case. Moreover, the applicant being one of the directors is equally liable if there is any overt act committed by other directors or accused persons. It cannot be overlooked that the role of director of a company envisages certain responsibilities and liabilities for the act of the company. From the resolution referred to above, there can be no doubt that on that particular date the applicant was holding the post of director and was in fact concerned with the affairs of the company. I find much merit in this submission. 12. The learned counsel for the applicant has submitted that the F.I.R. mentions other transactions and the specific transactions relating to KD and KCDIL are not mentioned in the F.I.R. and it appeared only in the

charge sheet. After the F.I.R. was lodged, investigation commenced and the it is during the course of this investigation that these dealings were unearthed. The fact that no details of the activities of the applicant are given in the F.I.R. can be no ground to discharge the applicant. As stated earlier, Ten lakhs NCDs of KCDIL were placed with BOIMF. At the time of placing, it was stated that the company would come out with a public issue and the loan of Rupees Ten Crores taken from BOIMF was to be returned after the public issue was subscribed. However, it is seen that thereafter there was no public issue. The said loan of Rupees Ten Crores was given on certain terms and conditions. One of the terms and conditions was that the debentures should be secured by joint pari-pasu charge on fixed assets of the company within a period of three months. This condition was imposed as charge had already been created in favour of State Bank of India and Vysya Bank. Further condition was that a undertaking should be executed in this regard by the company i.e. KCDIL that it would obtain and submit with BOIAMC, a NOC for creating charge in their favour from the respective charge holders i.e. State Bank of India and Vysya Bank. This has been stated by witness Ajit Shah who was the former Chief Manager of BOIAMC. This witness has clearly stated that the company did not submit NOC from the State Bank of India to BOIMF nor did the Company create

charge on the assets in favour of the BOIMF. Reminders to this effect was issued to the company vide letters dated 15.11.1995 and 30.11.1995 by this witness. The company did not pay interest due from 31.1.1996 and the post dated cheques given by the company were returned unpaid as and when presented for clearance.

13. In respect of placement of NCDs worth Rupees Ten Crores, a Resolution was passed in the meeting of Board of Directors held on 25.7.1995. In the said meeting, it was resolved that the company may place NCDs valued at Rupees Ten Crores with BOIMF on the terms and conditions and as may be mutually agreed upon. An undertaking dated 22.8.95 was given by KCDIL whereby they agreed and undertook to obtain NOC from the company's Bankers for availing funds by way of NCDs within a period of three months. The said undertaking was not honoured by the company. Thus, it is seen that KCDIL of which the applicant was Director took an amount of Rupees Ten Crores but they did not create any charge or obtain NOC from their Bankers. Thereafter, the company stopped paying interest and the cheques issued by the company were dishonoured. Thus the company committed fraud on BOIMF.

14. From the statement of account of KD and KCDIL, it appears that the companies were in financial

difficulties and hence, they have heavily borrowed from State bank of India and Vysya Bank. On account of this borrowing, charge was created on the assets. To get over the financial difficulties, it was decided by KCDIL to issue a public issue. To show that the shares of the company were in demand, a flurry of activity in the trading of shares was shown. Actually it is seen that subsidiary companies of KD and KCDIL itself bought the shares. The payment for these shares came from the sister concerns of KD and KCDIL. P.W.37 Mr. Pankaj Kapadia has stated that during the period from 26.8.1994 to 24.11.1994 he had purchased large number of shares of KD. The shares purchased by him were sold by him to certain companies. From the statement of account, it is seen that M/s. Kiran Enterprises has paid an amount of Rupees Two Crores towards the purchase of shares. P.W.35 Mr. Ramamoorthy has stated that the cheque relating to the amount of Rupees Two Crores given by Kiran Enterprises has been signed by Mr. Ramgopal Sharma. Mr. Ram Gopal Sharma was working as Senior Manager of KD. So also P.W.41 Mr. Kanti Raut, Chief Manager of State Bank of India, has stated that cheque No. 458540 dated 11.11.1994 for Rupees Two Crores issued in favour of Mr. Pankaj Kapadia was received in clearing from Bank of India, Stock Exchange Branch. The funds of this cheque were debited to Kiran Enterprises which had an account with his Branch. Mr. Kanti Raut has further stated

that cheque had been signed by Shri. Ramgopal Sharma as a proprietor of the firm. P.W.35 Mr. Ramamoorthy has further stated that M/s. Great Glen Distilleries and Wineries Ltd. is a group company of Kedia group. The Bank statement of M/s. Great Glen Distilleries shows that Rupees One Crore were withdrawn on 22.11.1994. This cheque was given to M/s. Surya Traders. The Bank account of M/s. Surya Traders shows that the said amount of Rupees One Crore was credited to their account. M/s. Surya Traders in turn gave a cheque of Rs.2,46,95,000/- in favour of P.W.37 Pankaj Kapadia. This payment was towards purchase of shares of KD.

15. P.W.3 Mr. K.H. Vohra, General Manager of Bank of India states that the BOIAMC was looking after the investment placed with BOIMF. He has stated that "Term Loan" could not have been advanced by mutual fund. Mr. Vohra has stated that the dealing between KCDIL and BOIMF clearly amounted to term loan, as the shares were purchased on the assurance that they would be bought back by the seller on a subsequent date. The said shares were to be bought back at the rate which was decided by loading the interest due on the date of resale of the said shares. This clearly amounted to term loan which was prohibited. In respect of the debentures, Mr. Vohra has stated that the investment of Rupees Ten Crores in the purchase of Ten lakhs debentures of KCDIL in July, 1995 was in

contravention of SEBI guide-lines. This witness has further stated that debt instrument should be rated as investment grade by a credit rating agency, but in this case, there was no enquiry to ascertain whether the debentures placed by KCDIL with BOIMF were of investment grade. Mr. Vohra has further stated that it was known to the Bank that the financial position of the group companies was not sound yet these facilities were provided.

16. P.W.11 Ms. Sangeeta Garg has stated that accused No.1 Mr. S.L. Dave, the then Managing Director of BOIMF informed her that the shares of KD were purchased by BOIMF on buy back basis. The management of the company had assured that they would buy these shares after some time. This witness has further stated that Mr. Dave directed her and one other person to calculate the repurchase price of these shares after adding interest ranging from 18% to 25%. Accordingly, she had calculated the period of holding the shares and loaded interest for 297 days i.e. from 29.5.1995 to 20.3.1996. This clearly shows that the loan was given as "Term Loan" which was prohibited.

17. As far as the amount of Rupees Ten Crores which was taken as loan from BOIMF on placing Ten Lakhs NCDs of KCDIL, it was stated that the amount was to be used for working capital for its plant at Alwar in

Rajasthan. One of the conditions imposed by BOIMF on KCDIL was that it should create Pari pasu charge on the assets of the company, obtain NOC from their Banks and they should submit Chartered Accountant's certificate certifying that the funds raised under the issue will be utilised for working capital requirements. Mr. V. Nagraju, an Officer of the Vysya Bank with whom KD had an account, has stated that as soon as the amount of Rupees Ten Crores was credited to KCDIL, the company transferred Rupees 6.3 Crores to the account of KD vide cheque No. 849404 dated 26.8.1995. The statement of account of KD shows that Rupees 6.3 crores was credited to its account on 26.8.1995 by way of transfer against the aforesaid cheque of KCDIL. This witness has clearly stated that these funds had been utilised by the company for their own use. Out of Rupees Ten Crores, Rupees 3.12 Crores was used to wipe out the negative balance of KCDIL. This fact is borne out by the statement of account of KCDIL.

18. Mr. Mundargi, has stated that even assuming that the applicant was the director of the company, he cannot be made vicariously liable. It is further submitted that there is nothing to show that the applicant was in charge of the day to day affairs of the company and he was thus responsible for the decision taken by the company. It must be kept in mind that the applicant is facing a charge of

criminal conspiracy. The material on record specially the resolution dated 20.10.1995, referred to above clearly shows that the applicant was concerned with the day to day affairs of the company. Mr. Mundargi, has further submitted that unless statutorily provided there can be no vicarious liability under the penal law. Reliance has placed on the decision of the Supreme Court in the case of **Hiralal Harilal Bhagwati Vs. CBI, New Delhi reported in (2003) 5 SCC 257.**

19. Mr. Mundargi, has also placed reliance on the decision of the Supreme Court in the case of **Union of India and Anr Vs. Major J.S. Khanna & Anr reported in 1972 Cri.L.J. 849**. He has placed reliance on the observations therein that even if rules are not followed and there is gross negligence it cannot be said that there was a criminal conspiracy. As stated earlier, the applicant has substantial interest in the companies. Total 5.10 lakhs shares of KD were placed at Rs.130/- per share with Bank of India. It was specifically represented to the Bank of India that the said shares would be bought back at Rs.157/- per share. Ultimately only 15,000/- shares were bought back at Rs.157/- per share. On account of this, Bank of India came to be cheated to the tune of Rs.6.32 Crores.

20. Mr. Gupte, on the other hand has pointed out

that the applicant was holding substantial number of shares in the companies. The applicant holds 10% shares in the companies in question and thus he would definitely be interested in any of the financial transactions of the company. Mr. Gupte has submitted that the applicant is facing charge of conspiracy. He is the director of the company, he holds substantial number of shares and therefore, nothing could be done without his knowledge. Mr. Gupte has submitted that both the KD and KCDIL were in financial difficulties and they had already taken loan amounts from State Bank of India and Vysya Bank. On account of this, there was a charge on the assets of these companies. To get out of the financial difficulties, it was decided to issue debentures. To get the public to subscribe to the debentures the accused persons felt it was necessary to show that shares of the company were in demand. Hence, intense activity in buying and selling shares of these companies was artificially created. It is seen that it is the subsidiary companies or sister concerns of KD and KCDIL which bought large amount of shares. This fact is also supported by the statement of witness Suresh Jain and statement of Mr. Nagraju wherein Mr. Nagraju has stated that the aforesaid companies are sister concern and directors of these companies are common and employees of KCDIL and KD have been shown as directors of the other companies. Thus, on account of all this artificial activity, it

was shown that shares of the company were in great demand and on account of these artificial activities showing trading in large number of shares the prices of shares were also artificially hiked.

21. Mr. Gupte has reiterated that the applicant is mainly facing prosecution under Section 120-B. He placed reliance on the decision of the Supreme Court in the case of **Ram Narayan Popli Vs. CBI (2003) 3 SCC 641.** In the said case it is observed that for the offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. In the case of conspiracy,

there can not be any direct evidence. It is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. The Supreme Court has observed that there shall be a prima facie evidence of affording a reasonable ground for a Court to believe that two or more persons are members of the conspiracy. If the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence

against the other. The Supreme Court further observed that direct evidence of a conspiracy is seldom available. Offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference. It is not required that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trappings of the provisions contained in Section 120-B. The Supreme Court has further observed that the express agreement, however, need not be proved, nor actual meeting of two persons is necessary, nor it is necessary to prove the actual words of communication. Lastly the Supreme Court has observed that overt act is not essential when the conspiracy is to commit a punishable offence.

22. On perusal of the material produced by the prosecution in this case, it is seen that there is

enough material to say that prima facie case exists against the applicant. The Supreme Court in the case of **State of Maharashtra and Ors. Vs. Som Nath Thapa & Ors reported in (1996) 4 SCC 659**, has observed that if there is ground for presuming that accused committed offence the court can justifiably say that a prima facie case against him exists.

23. Looking to the material on record, I am of the opinion that prima facie case exists against the applicant, thus, this is not a fit case to quash the proceedings relating to Special Case No. 29 of 2003 which is pending before the learned Special Judge, Greater, Mumbai. Hence, application is rejected.

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